FILE COPY

FILED
NOV 29 1933
CHARLES ELMORE CROPL
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575

JOHN L. GALVARY,
*Petitioner,*

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

W. T. KINDER,
Union Trust Bldg., Cleveland, Ohio,
*Attorney for the Respondent.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

**No.** .....

JOHN L. GILVARY,
*Petitioner,*

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

W. T. KINDER,
Union Trust Bldg., Cleveland, Ohio,
*Attorney for the Respondent.*

# INDEX.

Table of Authorities ..... 1

Statement ..... 3

The decision below is not in conflict with the applicable decisions of this and other courts ..... 8

If the case were here upon the merits the failure of the trial court to direct a verdict for the defendant would have required an affirmance ..... 16

Conclusion ..... 18

Appendix "A" ..... 19

## Table of Authorities.

*Arizona Employers' Liability Cases*, 250 U. S. 400 ..... 14

*Atlantic City R. R. vs. Parker*, 242 U. S. 56 ..... 17

*Baizley Iron Works vs. Span*, 281 U. S. 222 ..... 11

*Baltimore & Ohio R. R. Co. vs. Groeger*, 266 U. S. 521 18

*Bell vs. Southern Casualty Co.*, 267 S. W. 531 ..... 12

*Berry vs. Donovan*, 120 Maine 457, 115 Atl. 250 ..... 15

*Booth Fisheries Co. vs. Industrial Commission*, 271 U. S. 208 ..... 15

*Chicago, M. & St. P. Ry. Co. vs. Coogan*, 271 U. S. 472 ..... 18

*Chicago, R. I. & Pacific Ry. vs. Brown*, 229 U. S. 317 17

*Chesapeake & Ohio Ry. vs. Martin*, 283 U. S. 209 ..... 18

*Clark vs. Stewart*, 126 O. S. ..... 6

*Cohens vs. Virginia*, 6 Wheat. 264 ..... 16

*Director General of Railroads vs. Ronald*, 265 Fed. 138 ..... 10

*Employers' Liability Co. vs. Cook*, 281 U. S. 233.... 12
*Employers' Liability Co. vs. Cook*, 31 Fed. (2) 497 12
*Erie Railway vs. Winfield*, 244 U. S. 170..... 11
*Gurnsing vs. Cooley*, 281 U. S. 90..... 18
*Hawkins vs. Bleakley*, 243 U. S. 210..... 13
*Jeffrey Manufacturing Co. vs. Blagg*, 235 U. S. 571 14
*Leathe vs. Thomas*, 207 U. S. 93..... 16
*Millers' Indemnity Underwriters vs. Braud*, 270 U. S. 59..... 12
*Missouri Pacific Railroad vs. Boone*, 270 U. S. 466.. 16
*Mountain Timber Co. vs. Washington*, 243 U. S. 219 13
*Murdock vs. Memphis*, 20 Wall. 590..... 16
*New York Central R. R. Co. vs. White*, 243 U. S. 188 .....13, 14
*New York Central R. R. Co. vs. Winfield*, 244 U. S. 147 ..... 10
*Northern Coal Company vs. Strand*, 278 U. S. 142... 15
*Railroad vs. Armburg*, 285 U. S. 234..... 14
*Ross vs. Schooley*, 257 Fed. 290..... 9
*San Antonio Ry. vs. Wagner*, 241 U. S. 476..... 17
*State ex rel. Yaple vs. Creamer*, 85 O. S. 349..... 14
*State Industrial Commission vs. Nordenholt*, 259 U. S. 263 ..... 11
*Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33.. 9
*United States vs. Jin Fuey Moy*, 241 U. S. 394..... 16
*Ward vs. Erie Railroad Co.*, 230 N. Y. 230..... 9

# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

**No.....**

JOHN L. GILVARY,
*Petitioner*

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

### STATEMENT.

It is necessary to amplify somewhat the statement of the case contained in petitioner's brief, in order to clarify the issues that this case presents.

The petitioner, John Gilvary, was injured during his employment as a brakeman by The Cuyahoga Valley Railway Company. The Cuyahoga Valley is the plant railroad of The Otis Steel Company at Cleveland; it engages occasionally in interstate commerce, but, at the time of the petitioner's injury, it was conducting an entirely intrastate operation. (R. 39-42.) Gilvary's arm was severely injured when he went between two cars standing upon a curve in the track, after they had failed to couple by impact. (R. 65.)

Gilvary brought suit in the Common Pleas Court for Cuyahoga County, Ohio, making several allegations of negligence and asking damages against the Railway in the sum

of $50,000. (R. 12.) At the trial of the case, he withdrew all allegations of negligence except that the Railway Company had failed to comply with the Federal Safety Appliance Act, and that the couplers of the cars in question were defective or insufficient within the meaning of that Act. (R. 55.) The only evidence adduced by the plaintiff on the alleged defect or insufficiency was the failure of the cars to couple by impact at the time of the accident. No witnesses were called to testify to an observed defect or mechanical insufficiency; and the plaintiff himself stated that his observation of the couplers at the time of the accident had showed no such mechanical imperfection. (R. 95, 96.)

In its answer, and on the trial of the case, the Railway relied on two defenses:

(1) It denied that the couplers were defective and introduced evidence showing that careful inspections and an actual coupling made immediately after the accident indicated that the couplers were adequate and were in perfect mechanical condition (R. 116, 117, 146, 152); that running tests made at different speeds on the day following the accident had demonstrated that the couplers operated flawlessly by impact alone (R. 172, 174, 176) (photographs of the couplers made the day after the accident were produced, R. 179, Defendant's Exhibits 6, 7 and 8); that at the time of the accident the cars were situated and the coupling attempted at the point of a ten-degree curve and on a slight grade (R. 76, 77, 140, 141, 183); that couplers necessarily possess four inches of lateral play, to permit them to accommodate themselves to curves in the track (R. 147, 191, 197); that to bring about an automatic coupling when, as in this case, the cars are on a curve, it is necessary to align the couplers with each other by adjusting the drawbars within the permissible lateral play thereof (R. 190, 196) and to open the knuckles of at least one

coupler; that it was the duty of Gilvary, before signalling the engineer to move the train, to adjust the drawbars, and if necessary to open the knuckles (R. 61, 72, 83); that the failure of the cars to couple by impact, which induced Gilvary to go between them, had resulted from his failure, before attempting the coupling, to align the couplers in order to accommodate the coupling operation to the curve.

(2) As a separate defense the respondent pleaded and established (and the petitioner concedes) (Stipulation, R. 245) that as authorized but not required or compelled by the Workmen's Compensation Act of the State of Ohio (Ohio General Code Sec. 1465-98), prior to the accident and at the time of his employment Gilvary had entered into a written agreement with the Railway Company by the terms of which his rights and those of his dependents, in the event of his injury or death sustained during an engagement in *intrastate commerce*, would be governed by the provisions of the Ohio Compensation Act. As hereinafter pointed out, the Ohio Act, like other compensation acts, provides a method of compensation for injuries and death sustained irrespective of fault and also provides compensation to employees or dependents in the event of injury or death from occupational disease, so-called, of all of which Gilvary would have received, and still may receive the benefits. The contract recites in full the statute under which it is made and requests on behalf of both employer and employee that the Ohio Compensation Commission approve their election to be governed by the Ohio Act as to injuries occurring in intrastate commerce. The contract recognizes that the insurance premium is payable by the employer to the state only in respect of employees who join in the contract and application; and the respondent had regularly paid into the state fund premiums for insurance and had otherwise complied with the act to the end that its benefits should be secured to its employees includ-

ing Gilvary. For the convenience of the Court, the relevant provisions of the Ohio Constitution and statutes and the contract itself are set out as Appendix "A" of this brief.

The trial court withdrew such defense from the jury (R. 227), holding that notwithstanding the intrastate character of the engagement the contract was as a matter of law no defense in an action asserting a violation of the Federal Safety Appliance Act.

The trial court likewise rejected the Railway's contention, made by a motion to direct a verdict (R. 217, 218), that the evidence failed to establish by the requisite degree of proof any defect in the coupler or couplers, and overruling the motion, submitted the question to the jury, which returned a verdict in favor of the plaintiff in the amount of $35,000. (R. 233.)

Upon error proceedings the judgment of the trial court was reversed by the intermediate appellate court, which entered final judgment for the respondent on the sole ground that the agreement between Gilvary and the Railway Company was a complete bar to the action, the appellate court, however, finding no other error in the proceedings below. (R. 4, 5.)

Plaintiff thereupon prosecuted error proceedings to the Supreme Court of Ohio. In that court the Railway, as authorized under the Ohio rule (*Clark v. Stewart*, 126 O. S. .....) not only urged in support of the judgment the agreement upon which the intermediate court had rested its decision but also made the contention that it was entitled to a directed verdict in its favor by reason of the state of the evidence on the question of the existence of a defective coupler or couplers.

The Supreme Court of Ohio being equally divided, the judgment of the Court of Appeals was affirmed without opinion. (R. 249.)

As a basis for petitioner's application here for writ of certiorari to review the judgment of the Supreme Court of Ohio, it is asserted that such judgment is in conflict with the decisions of this and other courts concerning the rights of railway employes injured in the course of *intrastate commerce* by reason of the use of equipment said to be defective under the provisions of the Federal Safety Appliance Act. The petitioner's statement indicates that this is the only issue presented. This contention is not wholly accurate. The question, for instance, what evidence will send to the jury a case under the Federal Safety Appliance Act is a question of Federal rather than of state law; which the Railway has raised in all the lower courts and which is open to it here. Of these and other matters which the Railway would urge upon this Court in support of the judgment, if the case were here upon the merits, the following propositions have a bearing upon the question whether certiorari should be granted:

1. The judgment of the Court below, to the effect that the State of Ohio may validly authorize but not compel or require an employer and an employee to agree that their respective rights and liabilities shall be controlled by the state compensation act so far as concerns injuries arising in intrastate commerce, does not conflict with the decisions of this or other courts which have considered this or analogous questions.

2. Should the case be heard by this Court on the merits, it would be disposed of on an alternative ground, which, since it does not raise a doubtful constitutional issue, would be considered under the settled rule of this Court before the question on which the petitioner seeks to bring the case here. The alternative ground is that under the rule laid down by the decisions of this Court construing the Safety Appliance Act the petitioner was not en-

titled to go to the jury on the evidence presented on the trial. This proposition would require the affirmance of the judgment for defendant, regardless of the decision concerning the validity of the contract between Gilvary and the Railway Company.

## I.

## THE DECISION BELOW, EFFECTUATING THE CONTRACT BETWEEN THE PARTIES TO BE BOUND BY THE OHIO WORKMEN'S COMPENSATION ACT AS TO TRANSACTIONS IN INTRASTATE COMMERCE, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OF OTHER COURTS.

No decision has intimated that, if an employee possesses a cause of action against a railroad for a violation of the Federal Safety Appliance Act, he may not voluntarily release it, by contract upon good consideration, which derives its force from the law of the State where it is made. There is no difference in principle between such a release after the fact, and an agreement made beforehand upon good consideration, fixing a fair and equitable means whereby injuries, both negligent and non-negligent, which might otherwise give rise to causes of action under the Safety Appliance Act, may be compensated for.

Gilvary's contract upon which the Railway relies does nothing more than this. When he went to work he agreed in express words to forego other rights of action that might have accrued to him, in favor of a quick, certain and equitable method of compensation for all injuries, whether or not attributable to his employer's fault, that arose in the scope of his employment in so far as it concerned intrastate business. The Ohio statute did not compel him or the Railway to enter into such an agreement; it put neither of them to their election; it merely expressed what would otherwise have been implied from the general prin-

ciples of the common law, that such a contract was wholly legal, and subjected it to the approval of the Ohio Compensation Commission (R. 53, 201, and Stipulation) to insure its fairness.

To give effect to such a contract according to its terms conflicts with none of the decisions that the petitioner cites. (See pp. 4 and 9 *et seq.* of the Brief in Support of Petition.) *Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33, decided that an employee whose injury was occasioned by a defective grab-iron while he was engaged in an intrastate movement had a right of action under the Safety Appliance Act. The Court held that in this respect interstate and intrastate commerce were so intimately blended that Congress might regulate both. Although no conflicting state law was involved, Mr. Justice Pitney, arguendo, used the language quoted at page 9 of the petitioner's brief, and indicated that state law might not interfere with such regulation. He spoke only of the inability of a state to enforce an inconsistent law as law. No syllable of his opinion casts doubt on its right to let the parties contract as they choose.

*Ross v. Schooley*, 257 Fed. 290 (C. C. A. 7), is an illustration of the principle expressed by the dictum of Mr. Justice Pitney in the *Rigsby* case. The employee was hurt by a defective coupler while engaged in intrastate commerce. The parties had made no agreement as to their rights and the court held that, as between the conflicting laws, the Federal Act controlled. Again the issue was the compulsion of the law as such, and not the right of the parties to agree on methods of compensation.

In *Ward v. Erie Railroad Co.*, 230 N. Y. 230, Mr. Justice Cardozo, whose language is quoted at pages 10 and 11 of the petitioner's brief, was dealing again with the claim that the New York Compensation Act of its own

force superseded the Federal law. That the Safety Appliance Act does not depend for its efficacy on the pleasure of the State is undoubted, but that proposition does not forbid the parties to agree as to their rights.

In *Director General of Railroads v. Ronald*, 265 Fed. 138 (C. C. A. 2), the court was considering the right of action possessed by a railroad employee, whose injury from a violation of the Federal Safety Appliance Act occurred while he was engaged, as a majority of the court held, in interstate commerce. The New York Compensation Act contained a clause much like that of the Ohio Act, providing that the act should apply in intrastate commerce only in so far as accepted by both parties. But, as has been seen, (a) a majority of the court thought that interstate commerce only was involved; (b) it nowhere appears that the parties in fact contracted that the New York Act should govern; and (c) when the case was argued in the Federal Courts there was not, as here, a decision of the State Courts applying such contracts to cases under the Safety Appliance Act. The dicta of Judge Manton quoted by the petitioner at page 14, therefore resolve themselves into the conclusion that as a matter of statutory construction the New York law is inapplicable to intrastate transactions involving the Safety Appliance Act—a conclusion that is irrelevant here, in the face of the binding construction given to the Ohio contract by the Ohio courts.

*New York Central Railroad Company v. Winfield*, 244 U. S. 147, is of course inapplicable here, because it only decided that, as to injuries occurring in interstate commerce, New York might not superimpose liability for non-negligent injuries upon the liability for negligent injuries resulting from the Federal Employers' Liability Act.

At page 12 and following of the brief for the petitioner, numerous cases are cited in support of the state-

ment that Gilvary's so-called election to be bound by the Ohio Act was inoperative. These cases do not establish that proposition. The "elective" state compensation acts there in question that were not permitted to apply to maritime or other transactions to which a compulsory act could not apply, have without exception provided that the parties should be bound by them, in the absence of an expressed dissent. An act drawn in this form can be said not to rely upon contract in the same sense as the Ohio Act. A state may imply a contract from the silence of the parties only in so far as it could have bound them directly by compulsory act. *Erie Railroad v. Winfield*, 244 U. S. 170. As regards the extent of the operation permitted, therefore, "elective" compensation acts of this type do not differ from compulsory acts. No inference can be drawn, therefore, concerning the scope which will be allowed to an actual contract between the parties from the foregoing decisions imposing limitations upon elective acts of this sort.

Thus in *Erie Railroad Co. v. Winfield*, 244 U. S. 170, the question was whether a presumed agreement, in the absence of dissent, to be bound by the New Jersey Act ousted the remedy of the Federal Employers' Liability Act as to an injury in interstate commerce. Mr. Justice Vandevanter indicated that since the state could not apply its law, as law, to such transactions, it could not attach the same consequence, by way of contract, to the railroad's silence. The case leaves open the effect of an actual agreement between the parties, even as to interstate injuries.

In *State Industrial Commission v. Nordenholt*, 259 U. S. 263, when holding the New York Act inapplicable to a maritime transaction, this Court indicated that the case was not helped by regarding the act as an "implied agreement." Similarly, in *Baizley Iron Works v. Spun*, 281 U. S. 222, a case involving a maritime tort, "the Pennsyl-

vania statute declares that there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes a written statement to the contrary."

The petitioner relies particularly on *Employers' Liability Co. v. Cook*, 281 U. S. 233, a maritime case involving the extent of the operation of the Texas Compensation Act. Neither the opinion of this Court nor of the Circuit Court of Appeals (31 Fed. (2) 497) contains any ground for the petitioner's statement that "the parties had formally submitted themselves, in advance of the accident, to the operation of the State Act"; and from *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 59, construing the same law, it appears that employees are presumed to accept the Texas plan of compensation unless they give written notice to the contrary.[1] The election of which Mr. Justice McReynolds spoke in the *Cook* case was again, therefore, implied rather than expressed, and, as in the *Winfield* case, could for that reason reach only those things about which the state might legislate directly. The same reasoning applies to the decision of the Texas Court of Civil Appeals in *Bell v. Southern Casualty Company*, 267 S. W. 531, in which, there being no actual contract, the Texas Act was held not to apply to a maritime tort.

The foregoing is, with the single exception noted below, a complete list of the cases on which the petitioner relies to invalidate his contract with the Railroad. At page

---

[1] The portion of the Texas statute in question (Art. 8306, Sec. 3-a) is as follows:

> "An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this state to recover damages for injuries sustained in the course of his employment if he shall not have given to his employer, at the time of his contract of hire, notice in writing that he claimed said right * * *."

15 he cites *Mountain Timber Company v. Washington*, 243 U. S. 219, *Hawkins v. Bleakley*, 243 U. S. 210 and *New York Central Railroad v. White*, 243 U. S. 188, to establish, as they do, that "the states may absorb both employer and employee into state compensation, either with or without their consent," from which he draws the conclusion that "the argument that there is a difference between elective and compulsory compensation laws is of no force." Aside from the fact that the word "elective" normally describes a system that, unlike the Ohio law here in question, presumes consent in the absence of dissent, it is very clear that, because the states have power to enact either sort of compensation law, it does not follow that the effects of the two are identical.

Finally, it may be noted that, in arguing at page 16 and following that a proper construction of the contract signed by Gilvary excludes causes of action under the Safety Appliance Act, even though they occur in intrastate commerce, the petitioner raises a point that is not open to him here. The construction of the Ohio statute and the contract made pursuant to it raise questions for the Ohio courts, which they have already answered adversely to the petitioner's contention.

To the foregoing authorities relied upon by the petitioner, which as has been shown are inapplicable here, may be opposed decisions of this and other courts which, we submit, establish the correctness of the decision below.

Accurately stated, the questions presented by this aspect of the case are whether the State of Ohio, by its constitutional provisions and its statutes enacted pursuant thereto, may validly authorize a contract between an employer and an employee, by the terms of which the parties agree, upon adequate consideration and subject to the approval and supervision of the state, to a method of determining

the compensation payable upon the contingency of an accident occurring with or without fault in intrastate commerce, and whether the contract becomes inoperative if it is made to appear that the injury in intrastate commerce results from the use of equipment said to be defective or insufficient within the meaning of the Federal Safety Appliance Act.

The validity of the Ohio Compensation Act and of other similar acts has been upheld against attack. *Jeffrey Manufacturing Company v. Blagg*, 235 U. S. 571, *State ex rel. Yaple v. Creamer*, 85 O. S. 349; and see *New York Central Railroad v. White*, 243 U. S. 188, and *The Arizona Employers' Liability Cases*, 250 U. S. 400. In *Railroad v. Arnburg*, 285 U. S. 234, this Court held that the Massachusetts Workmen's Compensation Act was not invalid because it withdrew from interstate carriers who failed to comply with the act and pay the required premiums the defenses of the fellow-servant rule and assumption of risk as to accidents occurring in intrastate commerce. It was argued that to require interstate carriers to submit their intrastate business to the provisions of the act, or in the alternative lose the use of these defenses, placed a burden upon interstate commerce; but Mr. Justice Stone gave it as the opinion of the Court that the matter of compensation for injuries received in intrastate commerce was committed to the sole determination of the several states.

Several cases of maritime torts have presented questions analogous to that involved here. It is of course well-established that a state may not apply a compulsory compensation act to torts occurring within maritime jurisdiction. But where the state act required the express assent of the employer, and the acquiescence of the employee, before it purported to bind either of them, the Supreme Court of Maine has held that the existence of the contract between employer and employee brought a maritime in-

jury within the cognizance of the state law. *Berry v. Donovan*, 120 Maine, 457, 115 Atl. 250.

This Court has indicated that it will take the same view in cases where an express contract to accept the state act has been made. In *Northern Coal Company v. Strand*, 278 U. S. 142, the majority opinion written by Mr. Justice McReynolds intimated, and the special concurrence of Justices Stone, Holmes, and Brandeis stated, that an actual agreement between the parties to be bound by the provisions of the state law would be valid even as to a maritime injury otherwise beyond the jurisdiction of the local compensation act.

Finally, although the Federal Employer's Liability Act expressly forbids any contractual modification of the rights to which it gives rise, the Federal Safety Appliance Act contains no such prohibition. We submit that Gilvary by voluntarily making this express agreement, as authorized by the constitution and statutes of Ohio, has estopped himself from challenging the statutory remedy that his contract has provided. *Booth Fisheries Company v. Industrial Commission*, 271 U. S. 208. This remedy is open to him even now.

This Court has never held, therefore, that a state may not give express permission to its residents to make express contracts concerning their respective rights and liabilities in the event of injuries occurring in intrastate commerce, even when those injuries have resulted from violation of the Safety Appliance Act. On the contrary, the decisions of this Court and of other Courts indicate that such a contract is valid, and will be given full effect in a case like the present.

## II.

## IF THIS CASE WERE HEARD HERE UPON THE MERITS, IT WOULD BE DISPOSED OF UPON A GROUND THAT WOULD MAKE IT UNNECESSARY FOR THIS COURT TO CONSIDER THE VALIDITY OF THE CONTRACT PERMITTED BY THE OHIO ACT.

It is a well-established doctrine of this Court that legislation will not be invalidated, nor even called in question, unless it is susceptible of no construction that will avoid the constitutional difficulty, and unless the decision is necessary to the disposition of the case. *United States v. Jin Fuey Moy*, 241 U. S. 394, *Missouri Pacific Railroad v. Boone*, 270 U. S. 466; and see *Leathe v. Thomas*, 207 U. S. 93, *Hurdock v. Memphis*, 20 Wall. 590, 635, and *Cohens v. Virginia*, 6 Wheat. 264, 441. Among the several propositions that would be urged by the respondent in this Court, there is one involving no constitutional question which would require the affirmance of the decision below, and thus dispose of the case without reaching the problem of the validity and effect of Gilvary's contract.

As pointed out above, the only evidence of a defect or insufficiency in the couplers of the respondent's cars was their failure to couple at the time of the accident, while the cars were on the point of a ten-degree curve. Gilvary testified that he observed no defects; rigid inspection immediately after the accident disclosed none; and running tests then and on the following day gave perfect results. There was testimony that side play of four inches in the drawbars to which the couplers are attached is essential and universal to let cars go round curves in the track, and that the degree of lateral play in these particular cars did not exceed that limit. (R. 153, 172, 175, 177.) There was further uncontradicted testimony that when a coupling is attempted upon a curve as sharp as ten degrees, the couplers should be aligned, and that, in the event of failure to take this pre-

caution, their failure to couple by impact is no evidence that they are defective or insufficient. Gilvary admitted that he did not align the couplers. (R. 81.)

Three decisions of this Court bear upon the question whether a mere failure of the couplers to work by impact will take the case to the jury. In *Chicago, R. I. & Pacific Ry. v. Brown*, 229 U. S. 317, 330, the Court relied upon counsel's concession that this was enough, but did not decide the point. In *San Antonio Ry. v. Wagner*, 241 U. S. 476, the question was expressly reserved; and in *Atlantic City R. R. v. Parker*, 242 U. S. 56, the Court dealt with a case in some respects similar to this in such a way as to show that here the defendant should have had a directed verdict.

In the *Parker* case the only evidence that the couplers violated the Act was their failure to couple at the time of the accident, when the cars were on a curve. Mr. Justice Holmes, admitting that there were arguments the other way, held that there was enough evidence to take the case to the jury, for the following reasons: (1) while some lateral play must be allowed to drawheads, and while (2) the position of the cars on a curve might have tended to throw the couplers out of line, yet (3) on the record in that case the jury might have found the curve so slight that the track must be considered straight, and (4) so much lateral play as would prevent coupling in that event was ground for an inference that the couplers failed to comply with the Act. The clear inference is that where, as here, the jury is not warranted in considering the track straight, or the amount of lateral play excessive, mere failure to couple, when the car is on a curve, will not take the case to the jury, when explained by failure to align the couplers properly.

Thus, on the assumption that the petitioner's showing of a failure to couple automatically by impact made a prima facie case, that case was adequately rebutted by the de-

fendant's evidence. The situation is therefore within the rule laid down in *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, *Gunning v. Cooley*, 281 U. S. 90, and *Chesapeake & Ohio Ry. v. Martin*, 283 U. S. 209, and many other cases, that "it is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury may reasonably draw therefrom would be insufficient to support a different finding."

## CONCLUSION.

We believe that the decision of the Ohio courts in this case is not in conflict with the decisions of this Court or of other courts. We believe that the decision below upon the Federal question concerning the validity and effect of Gilvary's contract with the Railway is in accord with the applicable decisions of this Court. We believe further that if the case should be heard here upon the merits, other contentions which the Railway would urge would dispose of the controversy without the necessity of determining the validity of Gilvary's contract. For these reasons we submit that his petition for a writ of certiorari should be denied.

Respectfully submitted,

W. T. KINDER,

*Attorney for the Respondent.*

## APPENDIX "A".

The provision of the Ohio Constitution relating to the passage of a workmen's compensation act reads in its relevant parts as follows:

> "Article II Section 35. Workmen's Compensation. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. *Such compensation shall be in lieu of all other rights to compensation or damages* for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease * * *." (Italics inserted.)

Pursuant to the foregoing constitutional provision a Workmen's Compensation Act was passed, being Sections 1465-37-110, which among other provisions contains G. C. Sec. 1465-70, which provides:

> "*Employers who comply * * * shall not be liable to respond in damages at common law or by statute * * * for injury or death of any employe, wherever occurring, during the period covered by such premium so paid * * *, or during the interval of time in which such employer is permitted to pay such compensation direct.*" (Italics inserted.)

Section 1465-98 gives express authorization for contracts of the sort entered into between Gilvary and the Railway. Section 1465-98 is reproduced in full in the form of contract prepared by the Ohio Industrial Commission and signed by Gilvary, which is reprinted below, as follows:

"Form A-100

Note: This form, after being fully filled out, should accompany the 'Application for Classification of Premium Rating.' Form should also be filled out to cover each new employee.

THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

Section 51 of Compensation Act
(Section 1465-98 G. C.)

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this Act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

To the Industrial Division of Ohio:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by

rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, *hereby elect* that their *respective rights and liabilities* growing out of injury or death to such employes or any of them, or their dependents in case of death, *shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases* in which such injury or death is sustained while such employer or employes *are engaged in intrastate commerce.*

Said employer and employes hereby *severally request the Industrial Commission* of Ohio *to approve their election* to operate under the Workmen's Compensation Law of Ohio.

EMPLOYE: John Gilvary."

Oct. 12, 1928 (Italics Inserted.)